1986

State of Utah v. Dennis Fixel: Brief of Respondent

Utah Supreme Court

David L. Wilkinson; Utah Attorney General; David B. Thompson; Assistant Attorney General; Attorney for Respondent.
Gregory M. Warner; Aldrich, Nelson, Weight & Esplin; Attorney for Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 860151
-v-	:	
DENNIS FIXEL,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF UNLAWFUL DISTRIBUTION FOR VALUE OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE BOYD PARK, JUDGE, PRESIDING.

DAVID L. WILKINSON (3472)
Attorney General
DAVID B. THOMPSON (4159)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

GREGORY M. WARNER (3388)
ALDRICH, NELSON, WEIGHT & ESPLIN
43 East 200 North
P.O. Box "L"
Provo, Utah 84603

Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 860151
-v-	:	
DENNIS FIXEL,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF UNLAWFUL DISTRIBUTION FOR VALUE OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE BOYD PARK, JUDGE, PRESIDING.

DAVID L. WILKINSON (3472)
Attorney General
DAVID B. THOMPSON (4159)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

GREGORY M. WARNER (3388)
ALDRICH, NELSON, WEIGHT & ESPLIN
43 East 200 North
P.O. Box "L"
Provo, Utah 84603

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES CITED

STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 860151
-v-	:	
DENNIS FIXEL,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF ISSUES PRESENTED ON APPEAL

The following issues are presented in this appeal:

1. Did the trial court err in refusing to dismiss the information filed against defendant or to suppress evidence on the ground that the police officer involved allegedly violated the provisions of UTAH CODE ANN. § 77-9-3 (1982)?

2. Was the evidence sufficient to support a conviction of unlawful distribution for value of a controlled substance?

STATEMENT OF THE CASE

Defendant, Dennis Fixel, was charged with unlawful distribution for value of a controlled substance, a third degree felony, under UTAH CODE ANN. § 58-37-8(1)(a)(ii) (Supp. 1983) (amended 1985) (R. 16). After a bench trial, he was found guilty as charged (R. 52). The court sentenced defendant to a term of zero to five years in the Utah State Prison, but suspended the sentence and placed him on eighteen months' probation (R. 53).

STATEMENT OF FACTS

At approximately 4:00 p.m. on March 5, 1985, an undercover officer for the Provo City Police Department accompanied David Kling to defendant's resident in Pleasant Grove, Utah. After Mr. Kling introduced the officer to defendant, the officer told defendant he wished to purchase some marijuana. Defendant indicated that half an ounce would cost sixty dollars. The officer handed three twenty dollar bills to Mr. Kling who in turn gave the money to defendant. Defendant then left the room, returned shortly thereafter with two small plastic baggies containing marijuana and handed them to the officer. Soon thereafter, Kling and the officer left (R. 79-84). Defendant was subsequently charged with unlawful distribution for value of a controlled substance (R. 16).

Prior to trial, defendant filed a motion which alternatively asked for dismissal of the charge against him or suppression of the evidence obtained by the officer on March 5 (R. 23-28). In the motion defendant argued that the relief requested should be granted because the officer had not complied with UTAH CODE ANN. § 77-9-3 (1982), a statute dealing with the authority of a peace officer beyond his or her normal jurisdiction. After a hearing, the trial court denied the motion (R. 68-68).

At trial, defendant admitted exchanging the two bags of marijuana for the officer's sixty dollars. However, he testified that after receiving the money, he had gone to a neighbor to obtain the marijuana; the marijuana given to the officer was not

his, and he had not retained any of the money for himself (R. 94-99).

SUMMARY OF ARGUMENTS

Defendant fails to articulate any grounds upon which the trial court was required either to dismiss the charge against him or to suppress evidence obtained by a police officer. Assuming that the officer was effectively acting as a private citizen, the evidence he provided at trial was clearly admissible.

Because this Court misconstrued the pertinent controlled substance statutes in State v. Ontiveros, 674 P.2d 103 (Utah 1983), it should overrule that case and affirm defendant's conviction.

ARGUMENT

POINT I

DEFENDANT FAILS TO ARTICULATE ANY GROUND UPON WHICH THE TRIAL COURT WAS REQUIRED EITHER TO DISMISS THE CHARGE AGAINST HIM OR TO SUPPRESS EVIDENCE OBTAINED BY A POLICE OFFICER.

UTAH CODE ANN. § 77-9-3 (1982) provides:

> (1) Any peace officer duly authorized by any governmental entity of this state may exercise a peace officer's authority beyond the limits of such officer's normal jurisdiction as follows:
>
> (a) When in fresh pursuit of an offender for the purpose of arresting and holding that person in custody or returning the suspect to the jurisdiction where the offense was committed;
>
> (b) When a public offense is committed in such officer's presence;
>
> (c) When participating in an investigation of criminal activity which originated in

> such officer's normal jurisdiction in cooperation with the local authority;
>
> (d) When called to assist peace officers of another jurisdiction.
>
> (2) Any peace officer, prior to taking such authorized action, shall notify and receive approval of the local law enforcement authority, or if such prior contact is not reasonably possible, notify the local law enforcement authority as soon as reasonably possible. Unless specifically requested to aid a police officer of another jurisdiction or otherwise as provided for by law, no legal responsibility for a police officer's action outside his normal jurisdiction and as provided herein, shall attach to the local law enforcement authority.

At the hearing on defendant's motion to dismiss or to suppress evidence, the prosecutor conceded that the officer from the Provo City Police Department who purchased the marijuana from defendant had not complied with § 77-9-3. Defendant contends that, under these circumstances, the trial court should have either dismissed the charge or suppressed the evidence obtained by the officer.

Although somewhat confusing, defendant's argument appears to be premised on the notion that the officer, because he failed to comply with § 77-9-3, could not validly have exercised peace officer powers in Pleasant Grove City and thus was acting as a private citizen when he purchased marijuana from defendant. Concluding that the officer, in his capacity as a private citizen, was acting illegally in making the buy (i.e., in violation of the state's drug laws), defendant argues that the trial court was obligated to grant him the relief he sought prior to trial. However, assuming that the officer was acting as a private citizen, and in violation of the drug laws, that fact

alone would not require suppression of the evidence he obtained. A party to a crime often provides the evidence against another party that leads to the latter's conviction. See, e.g., State v. Schreuder, 39 Utah Adv. Rep. 46, ___ P.2d ___ (1986). Although his noncompliance with § 77-9-3 may have exposed him to criminal liability or discipline from his department, the officer involved could legally provide evidence against defendant. Furthermore, defendant has not articulated any violation of the fourth amendment to the United States Constitution or article I, section 14 of the Utah Constitution that would justify suppression. See Utah R. Crim. P. 12(g) (UTAH CODE ANN. § 77-35-12(g) (1982)) (adopted by the Court in In Re Rules of Procedure, 18 Utah Adv. Rep. 3 (1985)); State v. Newbold, 581 P.2d 991 (Utah 1972) (recognizing the principle that the constitutional prohibition against unreasonable searches or seizures does not apply to searches or seizures by private persons).

All of the cases defendant cites in support of his position are distinguishable in that they hold that an arrest or detention effected by a police officer outside of his or her jurisdiction was illegal, and therefore required dismissal of the charges or suppression of the evidence obtained as a result of the detention or arrest. The officer who engaged defendant did not detain or arrest him; he merely obtained evidence from defendant. Unlike the cited cases, the officer did not exercise his peace officer authority in dealing with defendant outside of his normal jurisdiction.

Based upon the foregoing discussion, the trial court properly denied defendant's pretrial motion.

POINT II

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S CONVICTION OF DISTRIBUTION FOR VALUE OF A CONTROLLED SUBSTANCE.

Relying primarily on State v. Ontiveros, 674 P.2d 103 (Utah 1983), defendant urges that because the State presented no evidence that he retained any portion of the money he received in the drug transaction with the officer, the evidence was insufficient to support his conviction for distribution for value of a controlled substance. He suggests that the crime, if any, was arranging the distribution for value of a controlled substance under UTAH CODE ANN. § 58-37-8(1)(a)(iv) (Supp. 1983) (amended 1985).

Defendant was charged with violating UTAH CODE ANN. § 58-37-8(1)(a)(ii) (Supp. 1983) (amended 1985), which provided:

> (a) Except as authorized by this act, it shall be unlawful for any person knowingly and intentionally:
> . . .
> (ii) to distribute for value or possess with intent to distribute for value a controlled or counterfeit substance[.][1]

Two sections within the definitions portion of the Controlled Substances Act are important to the proper interpretation of § 58-37-8(1)(a)(ii). Section 58-37-2(8) provides:

> The word "distribute" means to deliver other than by administering or dispensing a controlled substance. "Distribute for value" means to

---

[1] Minor word changes were made in subsection (a) by the 1985 legislation. See 1985 Utah Laws ch. 146, § 1.

> deliver a controlled substance in exchange for compensation, consideration, or item of value, or a promise therefor. The word "distributor" means a person who distributes controlled substances.

Section 58-37-2(6) reads:

> The word "deliver" or "delivery" means the actual, constructive, or attempted transfer of a controlled substance, whether or not there exists an agency relationship.

Applying the first sentence of § 58-37-2(8) and the definition of "delivery" provided in § 58-37-2(6) to the facts of the Ontiveros case, it is clear that the defendant there was guilty of distributing a controlled substance. Under a literal reading of the second sentence of § 58-37-2(8), it would appear that he was also guilty of "distribut[ing] for value," in that there is no requirement that the distributor retain any portion of the "compensation, consideration, or item of value" received in exchange for delivery of the controlled substance. In other words, the distributor need only receive[2] something of value; he or she would not necessarily have to profit personally from the transaction. Cf. State v. Leek, 26 Wash. App. 651, 641 P.2d 209, 211 (1980) (holding that under Washington's statute making it unlawful "to sell for profit any controlled substance," "the receipt of any item or thing of some worth in exchange for a controlled substance is what is meant by the words 'for profit'"). Nevertheless, this Court held that the evidence was

---

[2] The word "receive" is used here as it is defined in Webster's New Collegiate Dictionary (1981), which is as follows:

> "1. to come into possession of"

not sufficient to show that Ontiveros was guilty of distribution for value, because "[t]he evidence only show[ed] that the appellant acted as the officer's agent in making the purchase from a third party." Ontiveros, 674 P.2d at 104.

Apparently, the Ontiveros Court took the position, as have some other courts construing similar provisions, that the "distribute for value" language contained in § 58-37-8(1)(a)(ii) does not apply to a person who is simply an intermediary between the real buyer and seller. See, e.g., People v. Lam Lek Chong, 407 N.Y.S.2d 674, 678-680, 379 N.E.2d 200, 205-206, cert. denied, 439 U.S. 935 (1978). However, such a construction was not justified, given the clear definition of "distribute for value" contained in §§ 58-37-2(6) and (8). The Ontiveros interpretation imposes upon the state the nearly impossible burden, in many cases, of proving that a distributor did not one hour, or one day, or one week after the transaction deliver all the proceeds of the "sale" to the "real" seller -- a burden not contemplated by § 58-37-8(1)(a)(ii) and one that cannot validly be read into it by this Court. Cannon v. McDonald, 615 P.2d 1268, 1270 (Utah 1980) (citing UTAH CODE ANN. § 68-3-11 (1978)) (noting that when the construction of a statutory provision involves phrases defined by statute, the provision must be construed according to the definition); State v. Leek, 64~~1~~ 14 P.2d at 211-12.

Furthermore, the Court's conclusion in Ontiveros that the case was "a classic case of arranging to distribute a controlled substance for value" is highly questionable. The classic case of arranging is best illustrated in State v.

Harrison, 601 P.2d 922 (Utah 1979), where the defendant merely arranged a meeting between the buyer (an informant) and the seller; he took no part in either the distribution of the controlled substance or the receipt of the money paid for it. See also State v. Hicken, 659 P.2d 1038 (Utah 1983). The Ontiveros fact situation only became arranging when the Court did not apply the literal statutory definition of "distribute for value" to a transaction where the defendant apparently acted only as an intermediary between the buyer and the seller. In arriving at the arranging conclusion, the Ontiveros opinion also ignored UTAH CODE ANN. § 58-37-8(1)(c) (Supp. 1983) (amended 1985) (defining unlawful distribution for no value) which, given the Court's interpretation of the "for value" language contained in § 58-37-8(1)(a)(ii) (which, the State believes, was incorrect), should have been the section relied upon for reversing the conviction, not the arranging provision. There can be little dispute that the defendant in Ontiveros committed an act that constituted distribution as defined in § 58-37-2(6).

Based upon the foregoing discussion, and with all due respect to the Court, Ontiveros appears to have been wrongly decided and should be overruled in the instant case.[3] The evidence clearly established that defendant personally exchanged a controlled substance for money -- an act that, under a literal

---

[3] In a previous case now pending before the Court, State v. Udell, Case No. 19641, the State seriously questioned Ontiveros and argued that it should be limited to its facts. Upon further reflection, the State now believes that Ontiveros should be overruled as a misconstruction of the relevant statutes.

reading of the pertinent statutes, constituted the unlawful distribution for value of a controlled substance. That defendant may not have retained for himself any of the money he received in exchange for the marijuana is inconsequential. What is significant, as far as § 58-37-8(1)(a)(ii) is concerned, is that defendant physically received something of value in exchange for the drug. Although the language chosen and the sentence structure used might have been better, § 58-37-8, as it relates to this case, clearly defines several distinct situations under which a person may be found guilty of a crime. First, when a person either distributes a controlled substance for value or possesses it with the intent to distribute it, he is guilty of the offense defined in § 58-37-8(1)(a)(ii). Second, when a person "agree[s], consent[s], offer[s], or arrange[s]" to distribute for value a controlled substance or a substance in lieu of a controlled substance, he is guilty of the offense defined in § 58-37-8(1)(a)(iv). See Hicken. Violation of either of those sections carries the same penalty. § 58-37-8(1)(b). Finally, when a person distributes a controlled substance, "wherein nothing of value is exchanged for such distribution," he is guilty of the lesser offense defined in § 58-37-8(1)(c). Under this scheme, the evidence was plainly sufficient to support defendant's conviction of distribution for value under the offense defined in § 58-37-8(1)(a)(ii).

CONCLUSION

Based upon the foregoing arguments, defendant's conviction should be affirmed.

RESPECTFULLY submitted this 22nd day of August, 1986.

DAVID L. WILKINSON
Attorney General

David B. Thompson

DAVID B. THOMPSON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and exact copies of the foregoing Brief were mailed, postage prepaid, to Gregory M. Warner, Aldrich, Nelson, Weight & Esplin, Attorney for Appellant, P.O. Box "L", Provo, Utah 84603, this 22nd day of August, 1986.

David B. Thompson